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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1350

GABRIEL SZEKELY, M.D., *Petitioner*

v.

FORREST D. MATHEWS, SECRETARY OF HEALTH, EDUCATION & WELFARE, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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FORREST D. MATHEWS, SECRETARY OF HEALTH, EDUCATION & WELFARE, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Gabriel Szekely, M.D., (Dr. Szekely) petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this case on August 8, 1975. At the time this case was originally filed, Caspar Weinberger was the Secretary of Health, Education and Welfare and hence was a named Defendant; he has since resigned and his successor is named as Respondent herein.

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DECISIONS BELOW

The initial opinion of the Court of Appeals is found at 517 F.2d 345-350. The judgment of the Court of Appeals and the order on petition for rehearing are included in our appendix. The decision of the United States District Court for the Southern District of Florida was reversed by the Court of Appeals and is also included in our appendix.

JURISDICTION

Our petition for rehearing, was timely filed. It was denied by the Court of Appeals on February 2, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

This action involves the Medicare Act, which Title XVIII of the Social Security Act. [42 U.S.C. 1395, etc.] The applicable part of the Medicare Act will be referred to in our brief as "Part B". Also involved is the Fifth Amendment to the United States Constitution.

COMPANION CASE

The Court of Appeals on August 8, 1975, also decided the case of *Mount Sinai Hospital of Greater Miami* v. *Weinberger,* which is reported at 517 F.2d 329. (*Mount Sinai*) Both *Mount Sinai* and the instant case were argued before the Court of Appeals on the same date. The District Court relied on the *Mount Sinai* decision, 376 F. Supp. 1099 when it entered judgment for your petitioner below. Petition for a writ of certiorari has previously been filed by Mount Sinai in this Court. While Mount Sinai, as a hospital, is involved with Part

A of the Medicare Act and your petitioner, as an assignee of benefits, is under Part B, essentially the same issues and law are involved in both cases. Instead of presenting this Court with a lengthy petition, we deem it in the convenience of all concerned to rely in great part upon the Mount Sinai petition herein.

QUESTION PRESENTED

Where Dr. Szekely's Medicare billings for the year 1970 were examined and approved by HEW pursuant to 42 U.S.C. 1395 y, which requires that no payments may be made under Part B which are not reasonable and necessary, and where HEW admits there is no evidence of fraud or that Dr. Szekely did not in fact perform and render the services for which he sought to be paid, does the application of common law right of recoupment by HEW constitute a violation of Dr. Szekely's Fifth Amendment rights?

STATEMENT OF THE CASE

A discussion of the Medicare Act is omitted as the same is adequately discussed in the Mount Sinai petition before this Court.

The petitioner is a doctor of medicine licensed to practice in the State of Florida. In 1967, and subsequent years, he rendered his healing art to patients, many of whom were Medicare beneficiaries under Part B and submitted claim forms, assignments, from such persons for payment.

HEW is prohibited by law from making any Medicare payments for medical services which are not reasonable and necessary for the diagnosis or treatment of illness or injury. 42 U.S.C. 1395 y. Nor is it allowed to make any such payments until it is first provided with

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the necessary information to determine the amount, if any, is due. 42 U.S.C. 1395 1(e). In many such instances prior to payment, information was requested of Dr. Szekely. Some of the claims were fully paid and others were not. As to unpaid bills, Dr. Szekely never sought to invoke administrative or judicial remedies for full payment.

In April, 1972, HEW, through its intermediary, Blue Shield of Florida, Inc., advised Dr. Szekely that current payments due him were being withheld as Blue Shield claimed payments to Dr. Szekely in the year 1970 were 25% higher than the average of other similar physicians in Dade County, Florida.

After subsequent "peer review" proceedings, this litigation was instituted in the United States District Court for the Southern District of Florida.

Subsequently, summary judgment was entered for Dr. Szekely by the United States District Judge, relying upon the *Mount Sinai* decision, in the United States District Court for the Southern District of Florida, found at 376 F. Supp. 1099.

The United States District Judge held that prior to the 1972 amendments to the Social Security Act, the Secretary was without legal authority to recover payments for alleged overutilization. It was also held the 1972 amendments applied to payments made to physicians *after* October 30, 1972. (App. 1a-2a).

The Court of Appeals reversed, holding that the Medicare Act recognizes common law recoupment for payments improperly made. The Court also held that permitting recoupment does not constitute supervision of the practice of medicine prohibited by 42 U.S.C. 1395.

REASONS FOR GRANTING THE WRIT

The decision of the Court below is an erroneous interpretation of the Medicare Act, the result of which, we submit, violates the Fifth Amendment rights of Dr. Szekely. It puts Dr. Szekely in jeopardy of losing thousands of dollars in Medicare payments to which he was found to be entitled by law for his services rendered in good faith to Medicare patients.

As indicated in the excellent brief submitted by Mount Sinai in this Court, the Medicare program involves billions of dollars. The decision below, we submit, will have an enormous impact upon not only the operation of Medicare but, in addition, upon the practice of medicine in the United States. Any physician who is paid by Medicare for his services is now exposed to being required years later to refund his fees even though the applicable law required coverage to be determined *prior* to the payment.

Were fraud involved, the decision below would be entirely justified. However, HEW does not claim the billings of Dr. Szekely were fraudulent or that he did not in fact perform the services for which he was paid. Instead, it sought to reimburse itself under the justification that the number of visits of Dr. Szekely's patients exceeded the average of visits of patients to other physicians in the community.

The effect of the decision below places the United States on a different level and not subject to long established common law principles of fairness and justice. In *United States* v. *Johnston,* 124 U.S. 236, the Supreme Court held that:

> "... the approval by the Secretary of the Treasury of an agent's account of expenses ... would not be

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> conclusive, if it appeared either that such approval was procured by fraud, or that such expenses were incurred in violation of some positive statute, or in contravention of public policy."

Dr. Szekely's Medicare billings in the year 1970 were approved in whole or in part by the Secretary of HEW, or his agents. No claim has ever been made by HEW such billings were fraudulent or violated existing statutes. Nor has HEW ever claimed that Dr. Szekely did not in fact perform the medical services for which he was paid.

The intent of Congress and the courts in this area has been that the physicians' opinion as to medical services must be given great weight. *Pippin* v. *Richardson,* 349 F.Supp. 1365 (M.D. Fla. 1972).

The Court of Appeals, in the *Mount Sinai* decision, relied upon *United States* v. *Barlow,* 132 U.S. 271 (1889). *Barlow*, however, involved fraudulently paid funds. Payments were fraudulently sought for mail services which were, not in fact performed. No fraud is involved in the instant case.

CONCLUSION

We submit the issue raised herein is of such national significance as to warrant this Court's review of the erroneous decision below. A writ of certiorari should, we urge, be issued to the Court of Appeals to review that decision.

Respectfully submitted,

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APPENDIX

Summary Judgment, United States District Court

APPENDIX

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 73-720-CIV-JE

GABRIEL SZEKELY, *Plaintiff*,

v.

CASPER WEINBERGER, *Defendant*.

Summary Judgment

THIS CAUSE is before the Court on defendant's motions to dismiss or, in the alternative, for summary judgment upon plaintiff's cross motion for summary judgment.

The plaintiff in this action seeks declaratory and injunctive relief. He asserts that the Secretary of the Department of Health, Education, and Welfare is without legal authority to reopen previously paid Medicare claims under Part B of the Medicare Act 42 U.S.C. §§ 1395j-1395w.

The First question to be resolved is whether or not this Court has jurisdiction. The plaintiff contends that jurisdiction is present under 28 U.S.C. § 1331(a) and 5 U.S.C. § 702. The defendant responds that this action is barred by the doctrines of soverign immunity and exhaustion of administrative remedies.

This Court finds that this action is not barred by 42 U.S.C. § 405(h) and may be maintained on the basis of federal question jurisdiction. *See, Kingsbrook Jewish Medical Center* v. *Richardson*, 486 F.2d 663, 666-67 (2nd Cir., 1973); *Aquavella* v. *Richardson*, 437 F.2d 397, 402 (2nd Cir., 1971); *Mount Sinai Hospital* v. *Weinberger*, No. 73-804 (S.D. Fla. F-b. 6, 1974). Moreover, the plaintiff has stated a claim for which relief can be granted on the basis of nonstatutory review under 5 U.S.C. § 703 of the Administrative Procedure Act.

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Since the thrust of the plaintiff's challenge concerns the legal authority of the Secretary to reopen previously paid claims, the case at bar comes within the *Larson-Dugan* "officer suit" exception to the doctrine of soverign immunity. *Dugan* v. *Rank*, 372 U.S. 609 (1963); *Larson* v. *Domestic and Foreign Commerce Corp.*, 337 U.S. 682 (1949). The Fifth Circuit Court of Appeals has stated that an "officer suit" is maintainable if the averments in the complaint are affirmative and explicit. *Carter* v. *Seamans*, 411 F.2d 767, 770-71 (5th Cir., 1969). The relief sought, cessation of the suspension order, does not offend *Larson's* admonition regarding relief requiring affirmative government action since the government routinely distributes medicare funds due to individual enrolee-beneficiaries absent an assignment being made.

The administrative procedures under 42 U.S.C. § 1395ff (a) and (b) concerning determinations of entitlement are inapplicable since payments were in fact made, and the defendant seeks to withhold current payments based on a determination of over-utilization. The Act does not require that administrative procedures be exhausted relevant to determinations of over-utilization.

The defendant contends that 42 U.S.C. § 1395gg(b) is statutory authority for the Secretary to reopen the plaintiffs' 1970 claims based on a present determination of over utilization. Even absent statutory authority, the defendant urges, the government has the common law right to extinguish a debt due by recoupment or by set-off.

On the issue of the Secretary's authority to reopen to recover payments for over utilization, this Court agrees with and follows the rationale of *Mount Siani Hospital* v. *Weinberger*, No. 73-804 (S.D. Fla., Feb. 6, 1974). *Mount Sinai*, held that prior to the 1972 amendments to the Social Security Act the Secretary was without authority to either impose sanctions or to recover payments for over utilization. See 42 U.S.C. § 1320c (Supp. II, 1972). Although

Mount Sinai is a provider of services case under Part A, its sound reasoning is applicable to the present case where the plaintiff submits claims as an assignee of an individual enrollee-beneficiaries under Part B rather than under Part A as a provider.

The 1972 amendments apply to payments made to practitioners and providers after October 30, 1972, and hence do not provide authority for recoupment of payments made to Dr. Szekely in 1970.

Therefore, Plaintiff Szekely is entitled to judgment on the merits and to a permanent injunction prohibiting unauthorized efforts by the Secretary to recoup medicare payments the plaintiff received prior to October 30, 1972, on the basis of a subsequent determination of over utilization. Therefore, it is,

ORDERED and ADJUDGED that:

1. The defendant's motion to dismiss or for summary judgment is denied.

2. The plaintiff's motion for summary judgment is GRANTED.

DONE and ORDERED at Miami, in the Southern District of Florida this *11th* day of July, 1974.

/s/ JOE EATON
United States District Judge

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ORDER

On Petition For Rehearing

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 74-3398

GABRIEL SZEKELY, M.D., *Plaintiff-Appellee,*

versus

FLORIDA MEDICAL ASSOCIATION, ET AL., *Defendants.*

CASPAR W. WEINBERGER, Secretary of Health, Education and Welfare, *Defendant-Appellant.*

Appeal from the United States District Court for the Southern District of Florida

On Petition for Rehearing

(February 2, 1976)

Before BROWN, Chief Judge, and GODBOLD and CLARK, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

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FORREST D. MATHEWS, SECRETARY OF HEALTH, EDUCATION & WELFARE, *Respondent*

SUPPLEMENTAL APPENDIX

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SUPPLEMENTAL APPENDIX

Before BROWN, *Chief Judge,* and GODBOLD and CLARK, *Circuit Judges.*

GODBOLD, *Circuit Judge:*

This is a companion case to *Mount Sinai Hospital of Greater Miami, Inc.* v. *Weinberger,* —F.2d—(CA5, 1975), decided this date. Proceeding as in that case on the theory of a common law right to recoup, the Department of Health, Education and Welfare [HEW] attempted to recoup from Dr. Gabriel Szekely approximately $14,000 allegedly paid to him for medically unnecessary services provided to beneficiaries under the Medicare supplementary medical insurance system in 1970. Before HEW could put into effect a freeze on future payments to him to offset the amount

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claimed, Dr. Szekely, just as the hospital did in *Mount Sinai*, sued for temporary and permanent injunctive relief against the freeze. The District Court, on cross motions for summary judgment and relying on the recent decision in *Mount Sinai*, 376 F.Supp. 1099 (S.D.Fla., 1974), granted injunctive relief. We reverse for reasons substantially similar to those that we have given in *Mount Sinai*.

The Medicare system is described in our *Mount Sinai* opinion. This case concerns Part B of the Act, providing insurance for supplementary medical services primarily physicians' services, 42 U.S.C. §§ 1395j-1395w (Supp. II).[1]

Under Part B, persons aged 65 and older, § 1395o[2] are eligible to enroll to obtain benefits, § 1395p, in return for payment of monthly premiums the amounts of which are established by the Secretary of HEW, §§ 1395r(b) and (c). These premiums and contributions from the federal government go into the Federal Supplementary Medical Insurance Trust Fund, § 1395t, to pay for the benefits provided by Part B, §§ 1395*l*(a) and 1395t(g). These include "medical and other health services," including *e. g.*, physicians', diagnostic, outpatient physical therapy, ambulance, and home health services, §§ 1395k and 1395x(s).

An enrolled individual who obtains a covered service can either pay for the service and request reimbursement, § 1395u(b)(3)(B)(i), of 80 percent of the reasonable charge, § 1395*l*(a), or assign the right to reimbursement to the person providing the service, who can collect as an assignee of the beneficiary, § 1395u(b)(3)(B)(ii). All payments are subject to a deductible, § 1395*l*(b). No pay-

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[1] Part A is the subject of *Mount Sinai*. Part C, containing general provisions applicable to both Parts A and B, is at issue in both cases.

[2] Hereinafter, all references to sections mean sections of Title 42 of the U.S.Code, 1970 edition, or a supplement thereto, unless indicated otherwise.

ment may be made for services that are not medically necessary, § 1395y(a)(1).

HEW is authorized to act through intermediaries called "carriers" for administration of Part B, § 1395u. These are private entities, like defendant Blue Shield of Florida, Inc., which perform a variety of functions as agents of HEW, such as determining the rates and amounts of payments and making the actual payments. Although payment for most services is limited to the "reasonable charges" for the services provided, §§ 1395*l*(a)(1) and (2)(A), this does not entail the kind of provisional payment and auditing procedures utilitized to determine "reasonable cost" under §§ 1395f(b), 1395g and 1395x(v) for purposes of Part A. Beneficiaries are reimbursed or doctors holding assignments are paid, on the basis of the amounts charged, subject to the carriers' responsibility to establish appropriate reasonable amounts pursuant to 20 C.F.R. § 405.501 *et seq.*

When payment on a claim is denied, the patient has a right to an "informal review determination" conducted by the carrier, § 1395u(b)(3)(C) and 20 C.F.R. §§ 405.801(a) and 405.807-405.812, and to a review of that decision in a hearing also conducted by the carrier, 20 C.F.R. §§ 405.820-405.835. A physician who has accepted an assignment from a patient has the same right to review as the patient, 20 C.F.R. § 405.801(a). Judicial review is not explicitly provided for determinations of benefits under Part B, although it is provided for determinations of amount of benefits under Part A and for determinations of eligibility or enrollment under Part B, §§ 1395ff(b)(1)(B) and (C) and (2). It is fairly clear from the words of the statute and regulations, § 1395u(b)(3)(C) and 20 C.F.R. § 405.801 *et seq.* that the hearing and review there provided to determine if payment is proper, are to be utilized prior to payment and not subsequently.

Dr. Szekely practices medicine in Dade County, Florida, and the larger part of his practice involves elderly per-

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sons who are usually Medicare beneficiaries. In 1970 he received approximately $70,000 in payments under Part B, paid pursuant to assignments given to him by his patients and submitted to the carrier.

In early 1972 the carrier ascertained that Dr. Szekely appeared to bill Medicare for an excessive number of office visits per patient and for excessive ancillary services provided in his office. It tentatively determined that 25 percent of all Medicare payments made to Dr. Szekely in 1970 would have to be returned. Peer review committee procedures affirmed the carrier's action. Dr. Szekely then brought this suit.

This case is, if anything, a stronger case for recoupment than *Mount Sinai*, and we accordingly hold that the government's common law right to recoup is available. The gist of the argument against recoupment is that prior cases have subjected to recoupment only gratuitous beneficiaries of government grants and recipients of excessive contract payments. Dr. Szekely argues that he is neither but rather a third-party provider of services who has given value in the form of medical services for all government funds received, and so should not be subjected to recoupment. But the Medicare Act specifically recognizes recoupment of overpayments from providers, § 1395gg(b)(1)(A). This recoupment is directed at overpayments for which beneficiaries might also be held liable, § 1395gg(b), thus excluding payments in excess of the reasonable charge, for which beneficiaries could never be at fault, § 1395gg(c). This leaves only coverage overpayments, *Cf., Mount Sinai, supra.*

Moreover, the physician-provider is in a unique position. His claim is that of an assignee of the beneficiary, which, in the absence of fraud, can be no greater than that of the beneficiary. *McKnight* v. *United States*, 98 U.S. 179, 25 L.Ed. 115 (1879). More important, the doctor is not a stranger to Medicare. On the contrary he is the crucial actor in the three-way relationship between beneficiary,

provider and HEW. It is obvious that the patient must rely on the doctor's judgment. The statute requires the Social Security Administration, in administering the Medicare Act, to rely on the doctor's judgment in the first instance by requiring his certification of medical necessity, § 1395n(a)(2)(B).[3] This certification requirement puts the doctor on notice that the assignment he takes from the patient is valid only where the services provided are medically necessary.

In *Mount Sinai* we hold that the Act not only does not abrogate the common law recoupment right with regard to coverage overpayments but that it specifically recognizes such recoupment in § 1395gg. The argument rejected in *Mount Sinai*—that the dichotomy in Part A between procedures relating to cost and those relating to coverage precludes common law recoupment of coverage overpayments —cannot be put forward logically with regard to Part B where the cost and coverage procedures are the same.[4] Section 1395gg, which recognizes common law recoupment, is in Part C, the general provisions applicable to both Part A and Part B. All that is said in *Mount Sinai* about § 1395gg is equally applicable here.

The 1972 amendments to § 1395gg and related sections confirm our view. As noted in *Mount Sinai,* the legislative history strongly suggests that recoupment against providers was considered the remedy of first resort. S.Rept. 92-1230, 92d Cong., 1st Sess., pp. 313-314 (1971). In addition to the two changes in § 1395gg, Congress in the same amending section added § 1395cc(a)(1)(B), which explicitly prohibited providers from taking an action over against

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[3] *And see, e.g.,* S.Rept. No. 404, 89th Cong., 1st Sess., p. 46 (1965) U.S. Code Cong. & Admin.News 1965, p. 1986: "The physician is to be the key figure in determining utilization of health services . . ."

[4] Doctors holding assignments have an identical right to a hearing and review of denial of claims prior to payment, § 1395u (b)(3)(C) and 20 C.F.R. § 405.801(a).

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beneficiaries where a service they performed was held unnecessary more than three years after notice of payment was sent. Social Security Amendments of 1972, Act of Oct. 30, 1972, P.L. 92-603, § 281(c), 86 Stat. 1455. This change is meaningless unless HEW has the right to recoup from providers payments made for unnecessary services more than three years after payment. Congress, again in the same amending section, added a fourth change which prohibits doctors from doing exactly what providers were prohibited from doing: attempting to collect from their patients charges for non-covered services where the determination of non-coverage is made more than three years after payment. P.L. 92-603, § 281(d), 86 Stat. 1455, codified as § 1395u(b)(3)(B)(ii). Similarly, this prohibition is meaningless unless HEW has the right to recoup payments from doctors for unnecessary medical services, and unless HEW may recoup more than three years after payment.

Although subsequent statements by Congress are not controlling, Congress' actions in this case carry unusually great weight. See the discussion in *Mount Sinai, supra.*

Appellees seem to suggest that the addition of the professional standards review organizations (PSRO) system in 1972 was an attempt to provide a remedy where Congress thought none had previously existed, and that this new remedy is a type of statutory recoupment. The target of the PSRO system, however, is not the same as that of recoupment. The latter concerns any kind of overpayment. The PSRO system was designed to deal with hospitals and physicians who abuse the program or who provide not only unnecessary but positively harmful services. Even if Dr. Szekely falls within the ambit of those amendments, that fact does not preclude the common law recoupment recognized elsewhere in the Act.

We have already noted that the difference in cost and coverage procedures in Part A, which was a mainstay of the trial court's opinion in *Mount Sinai,* are not present

in Part B. There are other administrative distinctions between Parts A and B which make a holding of statutory abrogation of recoupment even less appropriate for Part B than it would be for Part A. For example, Part A contains a preliminary payment and post-audit adjustment system for reasonable cost determinations, § 1395g. This system suggests that Congress considered recoupment against providers and decided to limit it to recovering reasonable cost overpayments. For the reasons given in *Mount Sinai,* we do not find that argument persuasive with regard to Part A. With regard to Part B there is no argument to be made along this line at all. Part B, does not have any provisional payment or annual audit or adjustment system, so there can be no implication that Congress meant to enact a limited form of recoupment from providers.

Similarly, other Part A provisions relied on by the trial court in *Mount Sinai,* §§ 1395f(e) and 1395cc(d), have no analogues in Part B. Thus a finding of abrogation is even less appropriate for Part B than it would be for Part A.

Permitting HEW to recoup funds paid out for medically unnecessary services does not constitute impermissible supervision of the practice of medicine, prohibited by § 1395. The only issue posed by recoupment—and it is the same issue posed in the denial of any claim, whether pursuant to explicit statutory pre-payment procedures or implicit common law post-payment recoupment—is whether the government should pay for the services provided. This does not constitute prohibited federal supervision of the practice of medicine.

Dr. Szekely's second amended complaint, upon which the trial court granted summary judgment, alludes to Fifth Amendment due process rights. Since that issue has not been decided, we remand the case for further proceedings not inconsistent with this opinion.

Reversed and remanded.

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BRIEF FOR THE RESPONDENTS IN OPPOSITION

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1350

GABRIEL SZEKELY, M.D., PETITIONER

v.

F. DAVID MATHEWS, SECRETARY OF HEALTH, EDUCATION, AND WELFARE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

This case, involving the Health Insurance for the Aged Act ("Medicare"), 42 U.S.C. 1395 *et seq.*, presents the same question now pending before this Court on petition for a writ of certiorari in *Mount Sinai Hospital of Greater Miami, Inc.* v. *Mathews,* No. 75-1041: whether the Secretary of Health, Education, and Welfare may recoup payments made to a medicare provider or other person for services subsequently determined to have been unnecessary and not covered by the Act.

Petitioner is a physician voluntarily participating in Part B of the medicare program.[1] In 1970 petitioner

[1] 42 U.S.C. (Supp. IV) 1395j-1395w. Pursuant to Part B, claims for payment may be submitted to the Secretary either by a beneficiary who receives covered services or by the physician who renders the services and who obtains an assignment of the claim for payment from the beneficiary. The other provisions of the Act are described in our brief in opposition to the petition for a writ of certiorari in *Mount Sinai Hospital, supra.* A copy of that brief is being furnished to petitioner's counsel.

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received approximately $70,000 in medicare payments pursuant to assignments from patients. Subsequently, upon review of these assigned claims, the Secretary determined that petitioner had received payment for some services that were medically unnecessary and therefore not covered by the Act (42 U.S.C. 1395y) (Pet. Supp. App. 4a). The Secretary therefore suspended current payments due petitioner in order to recoup the payments for these services.

Petitioner then commenced this action, seeking to enjoin the suspension on the ground, *inter alia,* that the Secretary had no authority to recoup payments for services subsequently determined to have been unnecessary and not covered by the Act (Pet. Supp. App. 1a-2a). The district court granted petitioner's motion for summary judgment (Pet. Supp. App. 2a).

The court of appeals reversed and remanded.[2] Relying upon its decision in *Mount Sinai Hospital, supra,* the court held that the Medicare Act did not abrogate the Secretary's common-law right of recoupment (Pet. Supp. App. 4a-5a).

The decision of the court of appeals is correct and does not warrant further review. As we noted at pages 6-8 of our brief in opposition in *Mount Sinai Hospital,* the government has inherent authority to recover funds illegally paid; this authority is abrogated only were Congress clearly has manifested its intention to do so, and Congress did not manifest such an intention in the Medicare Act.

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[2]Since the district court granted summary judgment on petitioner's claim that the Secretary lacked authority to recoup payments and did not consider petitioner's alternative claim that recoupment denied him due process, the court of appeals remanded the case to the district court for its consideration of the latter claim (Pet. Supp. App. 7a). Accordingly, petitioner's contention before this Court that the recoupment denied him due process is not ripe for review.

Petitioner contends that, notwithstanding these arguments, the government has authority to recover only funds that have been obtained by fraud, and that the Secretary has never contended that petitioner's claims were fraudulent. It is established, however, that the government's authority and duty to recover funds extends also to funds paid erroneously. *Wisconsin Central Railroad Co.* v. *United States*, 164 U.S. 190;. *United States* v. *Barlow*, 132 U.S. 271;[3] *Heidt* v. *United States*, 56 F.2d 559, 560 (C.A.5), cetiorari denied, 287 U.S. 501.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

APRIL 1976.

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[3]Petitioner contends that *United States* v. *Barlow*, *supra*, is inapplicable because it involved "fraudulently paid funds." In *Barlow*, however, this Court specifically stated that the existence of fraud was immaterial to the government's right to recoup the funds (132 U.S. at 281).

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